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No. 07-742

IN THE
Supreme Court of the United States

BEVERLY BOULEVARD, LLC,

Petitioner,

v.

CITY OF WEST HOLLYWOOD AND
WEST HOLLYWOOD COMMUNITY DEVELOPMENT
COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

When the Court asked the Respondent City of West Hollywood to file a "response" to the Petition, it undoubtedly expected the City actually to respond to the issues and arguments raised in the Petition. That did not happen.

The City's "response" is largely a factual exegesis, rather than an effort to address the serious First and Fifth Amendment issues raised in the case. As shown hereafter, even the City's factual quibbles are belied by its own brief and its own ordinance.

Notwithstanding anything raised by the City, it remains true that the law regarding regulation of outdoor advertising is in serious need of the Court's review. The law has been plagued with confusion during the nearly three decades since *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) and *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Commn.*, 447 U.S. 557 (1980). The Ninth Circuit's holding amply demonstrates the confusion, conflicting with prior decisions of other Courts of Appeals as well as this Court. Specifically, the Ninth Circuit held that aesthetic rationalizations alone are sufficient to justify stultifying a property owner's exercise of First Amendment rights,

resulting in an uncompensated Fifth Amendment violation when the City's action takes private property to benefit the general public. This case is an appropriate vehicle to address the issues.

I.

AESTHETICS — ALONE — CANNOT JUSTIFY THE CITY'S FIRST AMENDMENT VIOLATION

The City's argument about aesthetics is wrong in multiple ways.

First, the City asserts that its ordinance was based on safety concerns as well as aesthetics. (E.g., Br. in Opp., pp. 5, 9.) Wrong. The City quotes the part of its own ordinance entitled "Purpose" as follows (Br. in Opp., pp. 3-4), demonstrating pure aesthetics and nothing more:

> "The provisions of this chapter are intended to:
>
> "A. Encourage creative and well-designed signs that contribute in a positive way to the city's visual environment, express local character, and help develop a distinctive image for the city.
>
> "B. Encourage signs that are responsive to the aesthetics and character of their particular location, adjacent buildings and

> uses, and the surrounding neighborhood. Signs should be compatible and integrated with the building's architectural design and with other signs on the property." (West Hollywood Mun. Code § 19.34.010.)[1]

When a legislative body expressly states the purpose of legislation, "we need not speculate as to [its] objectives . . . ." (*Zobel v. Williams*, 457 U.S. 55, 61, n. 7 [1982].) (See also *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 [1973] [focus on "the stated purposes of the Act"]; *Edwards v. Aguillard*, 482 U.S. 578, 586 [1987] [same].) The West Hollywood city council can fare no better constitutionally than the United States Congress.

Indeed, in the specific context of examination of a suspected First Amendment violation under *Central Hudson*, judicial review is restricted to the statement of reasons expressed by the regulator. (*Edenfield v. Fane*, 507 U.S. 761 [1993] [discussed at Pet., p. 21, but ignored by the City].)

Second, the "evidence" (referred to generally by the City at Br. in Opp., p. 9 but never cited to the record) consisted simply of generalized papers, not

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[1] See also the District Court's opinion, quoting the City Council's findings when it refused to amend the ordinance in order to settle this litigation. (Pet. App. C-25.) The City, again, was wholly concerned with appearance, not safety. Indeed, the City's own brief shows its concern about the "quaint and hip" character of the neighborhood. (Br. in Opp., p. 4.)

on facts related either to the City in general or this neighborhood in particular. That sort of argument, too, is contrary to the Court's earlier decisions. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993), the Court held that a mere assertion of generalized safety concerns (there, dealing with news racks) was not sufficient to validate a First Amendment incursion. Rather, specific proof of a safety problem dealing with the regulated property was required. As there was none there, so there is none here.

Finally, the City relies on a complete misunderstanding of *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), quoting the Ninth Circuit's misinterpretation of that opinion. (See Br. in Opp., p. 15.) The Ninth Circuit went so far as to conclude that any argument that aesthetic interest alone could not justify a First Amendment violation was "foreclosed" by *Taxpayers for Vincent*. (Pet. App. A-6.) The manifold errors in that conclusion were discussed at Pet., pp. 18 and 23, but ignored by the City. In a nutshell, *Taxpayers for Vincent* involved safety factors that are absent here; regulated only signs placed on city-owned property (not private property, as at bench); and its holding was thus restricted to that context. *Taxpayers for Vincent* plainly did not authorize what either the City urged or the Ninth Circuit held. The Ninth Circuit's holding conflicts with the Sixth Circuit's holding in *Pagan v. Fruchey*, 492 F.3d 766, 776 (6th Cir. 2007; en banc) (discussed at Pet. pp. 22-23).

II.

METROMEDIA HAS CREATED CHAOS. THE CITY AGREES.

Nothing in the City's brief disputes the chaotic state of the law created by either *Metromedia* or *Central Hudson* and, particularly, by their interface. Indeed, the City concludes that "Petitioner rightly laments that *Metromedia* was a badly splintered decision" and that "weaknesses in first amendment jurisprudence . . . may arise from that fact . . . ." (Br. in Opp., p. 21.)

The City simply ignores those problems and rests on the assertion that Beverly's Petition should not be the vehicle by which the Court should address them. Such a conclusion might have more force if the City had actually analyzed any of the issues raised in the Petition. Instead, the City, for example, thinks it "noteworthy that the Ninth Circuit does not even cite *Metromedia* . . . ." (Br. in Opp., p. 14, n. 3.) That is correct, and that is part of the reason for this Court to act, not a reason to continue ignoring the problem.

As shown in the Petition, the holding in this case is representative of others reached by the Ninth Circuit (including *Ackerley Communications v. Krochalis*, 108 F.3d 1095 [9th Cir. 1997]) which the Circuit will not resolve by *en banc* proceedings. (See, e.g., Pet. App. D-59.) It has reached the point where that court believes it can decide these

complex issues in a brief memorandum. (See Pet. App. A-2 – A-7.) That leaves not only confusion, but conflict with other Circuits. (See Pet., pp. 12-15, 22-23.)

When coupled with *Central Hudson*, *Metromedia* can thus be applied to justify virtually any billboard regulation. Indeed, the City proves this vice clearly when it defends itself by saying that "the City even-handedly enforced the sign regulations" (Br. in Opp., p. 17), which means no more nor less than that it simply prevented anyone from access to "tall wall" communication except for those with Sunset Boulevard addresses. If the *Central Hudson* criteria can be twisted to such a degree that they justify such wholesale incursion on constitutional speech, then the Court's review is plainly needed.

None of that is analyzed in the City's response.

III.

THE NINTH CIRCUIT LACKS JURISDICTION TO IGNORE THE CALIFORNIA SUPREME COURT'S DEFINITION OF PROPERTY AND, BY SO DOING, OVERTURN FIFTH AMENDMENT PROTECTION

The City's brief ignores the Fifth Amendment arguments in the Petition, just as it ignored the First Amendment arguments.

The point is this: the District Court held that one of the Petitioner's signs was protected advertising property under California law and ordered compensation. That was in keeping with the California Supreme Court's broad interpretation of "advertising" under California statutory law. As that court put it (on remand from this Court in *Metromedia*), "'Advertising' is simply 'the action of calling something . . . to the attention off the public.' . . . Thus, in common usage a billboard bearing a political or even a personal message would be considered an 'advertising display sign.'" (*Metromedia, Inc. v. City of San Diego*, 32 Cal.3d 180, 188, 185 Cal.Rptr. 260 [1982].) As such, it is property and entitled to protection under Cal. Bus. & Prof. Code § 5412 (quoted by the City, Br. in Opp., p. 1). The Ninth Circuit, by *ipse dixit*, ignored California's *Metromedia* decision as well as this Court's earlier decision in the same case. (Pet. App. A-4.)

In response, the City quotes the California statute and the Ninth Circuit's conclusion *but not the California Supreme Court's application of the statute in Metromedia*, thus ignoring the expansiveness of that state law property definition, just as the Ninth Circuit had. (See Br. in Opp., pp. 8, 20.)

CONCLUSION

The issues raised in the Petition are important. The City has not shown the contrary. Petitioner asks that certiorari be granted so that the law governing this critical field can be clarified and so that Petitioner's First and Fifth Amendment rights can be vindicated.

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